The Need for Mandatory Mediation and Arbitration in Election Disputes

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I. INTRODUCTION

In the 2000 presidential election, the outcome rested on Florida's electorate votes in its winner-take-all system.[1] On the day after the election, George W. Bush led Al Gore by a margin of less than one-half of one percent in Florida.[2] This margin was so small, and the race so close, that the Gore campaign challenged the difference of 1,784 votes and contested the certification of the votes in certain Florida counties until officials recounted ballots with "undervotes"—those ballots that machines failed to count a vote for President.[3] The examination of Florida's voting system uncovered many flaws that led to questions regarding which votes counted and what constituted voter "intent" on disputed ballots.[4] The U.S. Supreme Court ultimately issued a decision that not only determined the winner of the Presidential election, ending the month of limbo over who would be the leader of the United States, but also arguably projected the Supreme Court as a political entity.[5]

In response to these events, Congress created and passed the Help America Vote Act of 2002 (HAVA).[6] Congress intended for HAVA to

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[1] Bush v. Gore, 531 U.S. 98, 98 (2000) (providing a thorough overview of the electoral events leading up to the case).

[2] *Id.* at 101.

[3] *Id.* at 101–02.

[4] *Id.* at 104, 105–06.

[5] JEFFREY TOOBIN, THE NINE 181 (2007) (detailing the backlash against the Court's decision to hear *Bush v. Gore* and the Justices' reactions to accusations that the decision was "a sham, a political fix, a putsch").

[6] Help America Vote Act (HAVA), 42 U.S.C. §§ 15301–15482 (2006) [hereinafter HAVA]; *see also infra* Appendix I.

address some of the issues that arose in the 2000 election by providing financial incentives for states that adopted it.[7] HAVA calls for states to make provisional ballots available, to purchase new machines, to move away from punch card systems, and to train poll workers.[8] Further, HAVA provides for a centralized database for each state to hold the names and addresses of all registered voters against which each jurisdiction can compare.[9]

However, Congress passed HAVA so rapidly that HAVA has many holes and unanswered implications for the jurisdictions that apply its terms.[10] In addition, many states have created their own statutes in an attempt to ward off future election crises.[11] In jurisdictions with close races, these statutory guidelines and election official decrees, although helpful, have led to greater litigation, which tests the potential outcomes of these rules.[12] Specifically, while HAVA provides jurisdictions and election officials with some guidelines for running elections, litigation is testing the boundaries of these guidelines.[13] As a result, litigation swamps courts and election officials during the months and weeks leading up to election.[14] This increase of time-

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[7] HAVA, 42 U.S.C. §§ 15481–15483, 15512–15523 (2006). The pertinent parts of the statute are reproduced in Appendix I.

[8] HAVA §§ 15522, 15523 (2006); *see also infra* Appendix I.

[9] HAVA § 15483(a)(1)(A); *see also infra* Appendix I.

[10] *See* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1207–08 (2005) (arguing that the changes in federal law made things "worse instead of better" in the early transition to reform, in part because "HAVA provided money and imposed very general standards, while leaving most of the details of election administration to the states and counties.").

[11] *Id.* at 1213; *see also* Appendix VI (presenting a compilation of codes by jurisdiction).

[12] *See* Tokaji, *supra* note 10, at 1206 (citing Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 939 (2005)) (discussing races in which the outcome is close enough to litigate versus those in which the "margin of victory exceeded the margin of litigation."); *see also* Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 252 (2007) (discussing the increased use of election litigation as election strategy, especially in close presidential races).

[13] *See, e.g.*, Ohio Republican Party v. Brunner, 544 F.3d 711 (6th Cir. 2008) (en banc), *vacated*, 129 S. Ct. 5 (2008) (considering whether Ohio Secretary of State Jennifer Brunner was appropriately registering information into a central database, per HAVA instructions).

[14] *See, e.g.*, *infra* Appendices III & IV (listing and summarizing the cases filed prior to the November 4, 2008 general election).

sensitive cases often continues to trouble courts and voters alike even after election day, especially in those jurisdictions with close races.[15]

In order to alleviate some of the negative repercussions associated with the litigation of election disputes, Congress should enact a federal statute providing for a mandatory mediation process for all pre-election disputes that arise more than one month before a scheduled election. The statute should also mandate arbitration for all disputes that arise within the one month immediately preceding an election, those that arise on election eve, and those that arise after the election. Section II describes the positive and negative effects of election litigation on the courts and electorate. Section III describes the mediation and arbitration processes as alternatives to litigation in election disputes, and explores why they are preferable to litigation. Section IV argues for the need for a federal statute mandating the use of mediation and arbitration in election disputes, and provides an example of what that statute may entail. Finally, Section V concludes that the adoption of a federal statute mandating mediation and arbitration in election disputes would help maintain some of the positive effects of election litigation while reducing the negative effects.

II. THE POSITIVE AND NEGATIVE EFFECTS OF ELECTION LITIGATION

The resolution of election-related disputes before elections benefits the election process in many ways.[16] While the use of litigation to resolve these disputes is often an effective solution, the concentration and timing of the litigation often leads to negative outcomes that can be detrimental to the election process.[17] The following section explores these positive and negative aspects of election litigation.

A. *The Positive Aspects of Election Litigation*

Due in large part to the media coverage of elections, litigation before the election may help the election process in several ways.[18] The filing of

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[15] *E.g.*, Sheehan v. Franken, 767 N.W.2d 453, 456 (Minn. 2009) (detailing the disputed 2008 Minnesota Senate race between Al Franken, Cullen Sheehan, and Norm Coleman that continued until June 30, 2009 when the Supreme Court of Minnesota unanimously affirmed the final election tally in favor of Franken).

[16] *See* Tokaji, *supra* note 10, at 1243 (offering that publicity surrounding pre-election litigation may reduce poll-worker and voter confusion by clarifying rules and informing voters of their correct precincts).

[17] *Id.*

[18] *Id.*

litigation can notify election officials of problems of which they might not have otherwise been aware, and the media coverage can educate the electorate on the nuances of the election process.[19] These aspects of litigation, if conducted before an election, may actually increase the efficiency of the election, poll worker knowledge, voter knowledge and confidence that their votes will both count and reflect their intent, and finally, increase the overall transparency of arguably the most important component of the democratic process.[20]

For example, election officials may not even be aware of the need for instruction on absentee and provisional ballot counting until after an election.[21] Issues of this nature may include how to count provisional ballots in the event of a voter's failure to fill-in a bubble but has written the name of a listed candidate, or when a voter has filled-in the bubbles for two candidates.[22] Anticipating and addressing these problems before the election could avoid many post-election disputes that drag out and leave districts in limbo.[23]

Further, the media coverage of pre-election disputes may also serve to educate poll workers and voters alike on the law surrounding voting in their jurisdiction.[24] For example, a pre-election public resolution that election officials must check voters' registrations against a central database may increase voter confidence that only registered voters' votes will count.[25] By

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[19] *Id.*

[20] *Id.* (suggesting that the publicity surrounding pre-election litigation may serve to educate some of the public that is following the case and increase transparency).

[21] *See, e.g.*, State *ex rel.* Myles v. Brunner, 120 Ohio St. 3d 328, 2008-Ohio-5097, 899 N.E.2d 120 (granting writ to compel the secretary of state to issue an order to prevent county boards of elections from rejecting certain absentee ballots).

[22] *See* Than Tibbetts & Steven Mullis, *Challenged Ballots: You Be the Judge*, MPR NEWS Q., Dec. 3, 2008, http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/. In the aftermath of the disputed 2008 Minnesota Senate race between Al Franken and Norm Coleman, Minnesota Public Radio created an online, interactive page with actual contested ballots from the Congressional race which allows site visitors to see how they would determine whether the vote should be counted for Franken, Coleman, or neither. The disputed ballots include overvotes (votes for more than one candidate), votes with added explanations for why the voter selected that candidate, overvotes with additional written-in candidates (for example, one voter repeatedly voted and also wrote in "The Lizard People" for each race), marks outside of the bubbles, and other voter inconsistencies. *Id.*

[23] *See generally* Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009).

[24] *See* Tokaji, *supra* note 10, at 1243.

[25] *See* Ohio Republican Party v. Brunner, 544 F.3d 711 (6th Cir. 2008) (en banc); *see also* HAVA § 15483(a)(1)(A), *infra* Appendix I.

resolving these types of disputes in the public eye, voters may believe that they are participating in fair and transparent elections.[26] Specifically, by observing the disputes between election officials and challengers before an election, voters may perceive that the media and political parties are properly monitoring the decisions of election officials, distancing themselves from political biases, and proactively attacking potential areas of corruption.[27]

Again, the increases in efficiency, education, voter efficacy, and transparency of the election process provided by pre-election litigation all arguably help to improve the democratic process as a whole. Still unknown, however, is whether these aspects of election litigation outweigh the negative effects of election litigation.

B. *The Negative Aspects of Election Litigation*

Unfortunately, there are many negative aspects surrounding the litigation of election disputes. These negative aspects have the potential not only to mar the election itself, but also the judicial system in its role as referee. This section argues that, regardless of when in the election process the parties choose to litigate a dispute, election litigation threatens the democratic process.

1. *Why Election Eve, Election Day, and Post-Election Litigation Is Negative*

Specifically, when problems with elections arise on election eve, election day, or post-election, voters may lose faith in the electoral system.[28] Voters may question whether their votes actually counted and reflected their intended vote, or may suspect that one political party is tampering with the election.[29]

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[26] *See* Tokaji, *supra* note 10, at 1244 (stating that pre-election litigation may help to promote the transparency of the administration of elections).

[27] *Id.*

[28] *Id.* at 1247 (noting that voter confusion and a lack of transparency in the election process can be detrimental to public confidence).

[29] *See, e.g.*, *id.* at 1240. For example, Tokaji notes that in the 2004 presidential election in Ohio, many voters who cast a vote, did not have their vote counted because of failure in election equipment: "There can be no serious question that tens of thousands of votes were lost in Ohio alone as a result of the continuing use of punch card voting equipment. Overall, 1.8% of the punch card ballots cast did not register a vote for president." *Id.* In addition, the most infamous example of voters not knowing whether their vote counted arose in the 2000 presidential election in Florida, where many Miami-Dade and Palm Beach County voters questioned whether their votes had counted or if

This loss in voter efficacy can seriously undermine democracy, sometimes discouraging potential voters from casting ballots because they do not believe their vote matters or will actually count.[30]

When courts face the heavy burden of deciding a case that essentially determines the outcome in a close election, loss in voter confidence decreases.[31] When election litigation forces courts into this position, the outcome can result in the electorate's impression that judges are political entities or political puppets.[32] The unfortunate result in these cases is not only a loss in voters' confidence in the election process, but also the public's loss in confidence in the judicial system.[33]

Further, litigation can drag on for years, leaving voting issues and questions regarding civil rights unresolved, while primary and general elections continue with issues still lurking.[34] Specifically, voters and

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they had accidentally voted for the wrong candidate due to misreading the ballot layout. *See* Bush v. Gore, 531 U.S. 98, 102–03 (2000).

[30] *E.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curium) (stating that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.").

[31] *See* Tokaji, *supra* note 10, at 1249–50 (discussing *Bush v. Gore* and the concern regarding perception of partisanship of Justices).

[32] *E.g.*, Posting of Edward Foley, *The Need for a Structurally Nonpartisan Tribunal*, http://moritzlaw.osu.edu/electionlaw/freefair/articles.php?ID=2631/ (Oct. 15, 2008) (discussing the concern of the split from the 6th Circuit in *Ohio Republican Party v. Brunner* and the Supreme Court in *Bush v. Gore*, advocating that instead of courts, a nonpartisan tribunal should settle election disputes in order to avoid putting judges in these positions). *See generally* Brunner v. Ohio Republican Party, 129 S. Ct. 5 (2008). Further, dissenting in *Bush v. Gore*, Justice Stevens wrote concerning the Court's involvement and decision:

> What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision.

Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

[33] *See* Tokaji, *supra* note 10, at 1249–50.

[34] Several cases resolved in 2008 were originally filed several years prior. *See* ACLU v. Santillanes, 546 F.3d 1313, 1316 (10th Cir. 2008) (originally filed on October 25, 2005 and resolved in 2008, Plaintiffs' argued that New Mexico's amended policy requiring photo identification at polling places denied voters, especially the homeless, equal protection under the Fourteenth Amendment); *see also* Fedder v. Gallagher,

candidates may not know who the winner of an election is for weeks or months after the election.[35] This uncertainty can result in a situation in which a candidate may take office following a disputed election, while ongoing litigation may ultimately result in his or her eventual removal.[36]

Finally, litigation of election-related disputes also costs taxpayers a lot of money. For example, leading up the 2004 presidential election, just ten of the twenty-three suits against then-Ohio Secretary of State Kenneth Blackwell cost Ohio taxpayers $1 million dollars.[37] As taxpayers see parties challenging issues in court, the parties risk that taxpayers will consider their challenges to be a frivolous waste of taxpayers' money.[38]

2. *Why Pre-Election Litigation Is Better, but Not Much Better*

Some scholars believe that avoiding post-election litigation is advantageous and that pre-election litigation actually helps to reduce post-election litigation.[39] Essentially, pre-election litigation can serve a preventative purpose by resolving issues before they escalate into larger problems. Further, addressing anticipated concerns before the election can reduce the large volume of cases that arise on election eve, election day, and post-election.[40] This reduction in election-related cases frees courts and

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06CA2996 (Fla. Cir. Ct. 2008) (copy on file with author) (originally filed on November 21, 2006 and resolved on January 31, 2008) (contesting the results of the 2006 general election for the 13th District Congressional race, alleging that Sarasota voters were denied their right to vote in the Congressional race because voting machines failed to count their votes); Harkless v. Brunner, 545 F.3d 445, 446–48 (6th Cir. 2008) (originally filed on September 21, 2006 and decided in October 2008) (alleging that the Ohio Secretary of State (then Kenneth Blackwell) and other election officials had violated the National Voter Registration Act by failing to provide voter registration forms to social service agencies).

[35] *See, e.g.*, Sheehan v. Franken, 767 N.W.2d 453, 456 (Minn. 2009) (issuing a decision in favor of Franken and settling the Minnesota Senate race on June 30, 2009, over seven months after the November 4, 2008 election).

[36] *Id.*

[37] Jon Craig, *Ohio Taxpayers Still on the Hook for Lawsuits Filed Over '04 Election*, CINCINNATI ENQUIRER, Dec. 24, 2008, at A1; *see also Hearing on Senate Bill No. 380, Before the Sen. Comm. On State & Local Government*, 2008 Leg., 127th Sess. (Oh. 2008) (testimony of Jennifer Brunner, Secretary of State), *available at* http://www.sos.state.oh.us/sos/upload/news/20081209.pdf (copy on record with author) (regarding the cost of litigation to taxpayers).

[38] *See* Craig, *supra* note 37.

[39] *See* Tokaji, *supra* note 10, at 1243 (advocating that parties "sue early, sue often" if they can anticipate a pre-election issue).

[40] *See infra* Appendices II-V (providing an overview of the forty-two election

election officials to focus on cases that they cannot anticipate before the election. Many of these foreseeable disputes need to be addressed earlier because they may become a serious point of contention after the election.[41] However, pre-election litigation also causes its own share of problems, for example, by confusing or frustrating voters.[42]

Specifically, voters may perceive disputes between election officials, many of whom are party-affiliated, as mere partisan bickering from which any outcome will ultimately favor one party's benefit over another's.[43] Further, the rise in pre-election litigation overwhelms the courts and, like later election litigation, places judges in the position of making decisions that voters may interpret as partisan pandering.[44] In addition, this concentrated litigation before an election can overwhelm the courts, potentially blocking or postponing other non-election-related litigation.[45]

C. *Summary: Keeping the Positives and Reducing the Negatives*

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disputes filed across the nation relating to the November 4, 2008 general election). Appendix II provides an overview of the forty-two election litigation suits between January 1, 2008 through those filed after November 4, 2008. Appendix III provides an overview of the twenty-three cases filed between January 1, 2008 to October 3, 2008, regarding the November 4, 2008 election. Appendix IV provides an overview of the eleven cases filed between October 4, 2008 and to the November 4, 2008 election across the country. Appendix V provides an overview of the eight cases filed between November 5, 2008 through January 2009.

[41] *See* Tokaji *supra* note 10, at 1243 (discussing the benefits to the election system of parties suing early and "often").

[42] *E.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curium) (stating that, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *see also* Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 995 n.171 (2007) (noting that, while the notion that election-related lawsuits are preferable before the election rather than after the election, "that general preference must be weighed against the destabilizing nature of last-minute lawsuits before voting begins.").

[43] *See* TOOBIN, *supra* note 5, at 148–49 (noting that in the 2000 Presidential Election dispute in Florida, the Republican Governor, Jeb Bush, was the Republican Presidential candidate's brother, and Secretary of State Katherine Harris was a Republican Party member).

[44] *E.g.*, posting of Edward Foley, *supra* note 32 (noting that, regardless of how free from bias the judges were, "one cannot help but wonder whether the party background of these Article III judges inadvertently affected how they weighed the equities.").

[45] *See infra* Appendix III. In the month leading up to the November 4, 2008 presidential election (beginning on October 4, 2008), eight time-sensitive cases were filed in courts across the country.

Ideally, the process of resolving election disputes should maintain the current positive outcomes of pre-election litigation, while reducing the negative outcomes. Specifically, any alternative should continue to be transparent to voters and continue to resolve important issues on the election process and outcome. However, an alternative should also be more time-efficient, not clog the court system, and should remove judges from the position of determining the outcome of elections. As the next section details, this alternative lies in the mandatory mediation and arbitration of election disputes.

III. MEDIATION AND ARBITRATION AS ALTERNATIVES TO LITIGATION IN ELECTION DISPUTES

Many jurisdictions already have statutes in place that encourage the use of mediation in election-related disputes.[46] In addition, the Federal Elections Commission (FEC) offers alternative dispute resolution (ADR), specifically mediation and arbitration, to resolve campaign finance disputes.[47] However, the use of arbitration and mediation still has a much greater potential for use in election disputes.

The use of mediation and arbitration in election disputes provides an approach to settling election disputes that maintains the positive aspects of litigation while reducing the negative effects. The big questions regarding the use of mediation and arbitration in election-related disputes are: what would these processes look like, and when and how should they be implemented? This section attempts not only to answer these questions, but also to argue

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[46] *See infra* Appendix VI.

[47] FEDERAL ELECTION COMMISSION, ALTERNATIVE DISPUTE RESOLUTION BROCHURE (2002), *available at* http://www.fec.gov/pages/brochures/adr.shtml. While the Federal Election Commission (FEC) does provide for mediation, a situation has yet to arise that has required its use.

> The design of the ADR pilot program in 2000, as well as the permanent program within the Compliance Division of the Federal Election Commission, had a mediation component. The plan was that mediation would be used in the event the dispute resolution specialists reached impasse with a respondent in negotiating a settlement. That being said, the ADR Office has yet to reach impasse with a respondent, and thus mediation has yet to be used. While the ADR Office has yet to utilize mediation to enforce the Federal Election Campaign Act, it does use traditional ADR processes to resolve matters; i.e., interest based negotiations with the primary focus on future compliance, and reality checks.

E-mail from Lynn M. Fraser, Acting Director, Alternative Dispute Resolution Office, Federal Elections Commission (Feb. 11, 2009, 14:37 pm EST) (on file with author).

that alternatives to the resolution of election disputes exist that do not require judicial decisionmaking in election outcomes.

A. *Mandatory Mediation in Pre-Election Disputes Up to One Month Before Election*

Mediation is a form of alternative dispute resolution that involves negotiating parties facilitated by a third party neutral or mediator with the goal of reaching a settlement.[48] The mediation process is not as formal as litigation, and the parties have control over the outcome of any settlement because they draft the settlement agreement themselves.[49] Although a mediator can conduct mediation through various media, the form that would be appropriate for election disputes would entail parties sitting face-to-face in a conference room with a court-appointed mediator. The process of mediation may provide the parties an opportunity to settle their election dispute on their own terms without the need for the court to issue a decision.

1. *Why Use Mediation Instead of Litigation in Election Disputes?*

The benefits of mediation are many. For most parties, mediation costs less than litigation and the process is finished in a shorter span of time.[50] Litigation may drag on for years, while mediation may enable parties to settle a dispute in as little as an afternoon.[51] Unlike litigation, mediation provides a forum in which parties may vent their frustrations and emotions, a process that may be important and therapeutic for the parties.[52] In addition, the

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[48] STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH RUDOLPH COLE, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 107 (5th ed. 2007) [hereinafter GOLDBERG ET AL.].

[49] *See id.*

[50] Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, 63 DISP. RESOL. J. 48, 50–52 (2008) (discussing the higher financial costs of litigation compared to mediation).

[51] *Id.* (offering that many parties choose alternative dispute resolution in an attempt to avoid the lengthy process of litigation); Leonard Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (discussing how the litigation process can take a much longer time than the mediation process).

[52] *See* GOLDBERG ET AL., *supra* note 48, at 343 (noting the importance to the parties to express their emotions, a process provided for by mediation, but rarely by the court system (citing F. Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994))).

mediation process also has the possibility of being less adversarial than litigation, an important component for those parties wishing to preserve their relationship after the dispute.[53] Mediation also provides the parties with the potential to gain information, evaluate the strengths and weaknesses of their cases, and receive a realistic and objective perspective on certain aspects of the dispute.[54] Even if the mediation fails, mediation still enables the parties to better understand the other side's arguments before they proceed to litigation.

Unlike litigation, mediation also provides parties with more control over the outcome of their dispute; the parties may design their own solutions and may produce more creative options than those available through litigation.[55] Because the parties have control over the solutions, parties that settle in mediation are often more satisfied with the outcome and have greater levels of compliance with the terms of the settlement than those parties whose outcome was determined by the court.[56] In addition to providing benefits to the parties of the mediation, mediation may also benefit courts by lightening caseloads.[57]

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[53] *E.g.*, Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 939–41 (1997) (discussing how a less adversarial role may be created by mediation); *see also* JOSEPH STULBERG, TAKING CHARGE/MANAGING CONFLICT 40 (1987) (discussing the potential for a less adversarial environment in mediation).

[54] *See* Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 872 (2008) (citing Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 266 (2002)) (discussing the use of mediation to "reality check" the facts of a party's case).

[55] *See* Tom R. Tyler, *The Quality of Dispute Resolution Procedure and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 428 (1989) (discussing the commitment and satisfaction that parties often feel towards their own settlements).

[56] *Id.*; *see also* Robert Baruch Bush, *The Unexplored Possibilities of Community Mediation: A Comment on Merry and Milner*, 21 LAW & SOC. INQUIRY 715, 729 (1996) (discussing that parties experience a greater level of satisfaction and a higher level of compliance with self-created settlements).

[57] *E.g.*, Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d. 1164, 1172 (C.D. Cal. 1998) (noting that, among other benefits, mediation provides the parties with "a more cost-effective method of resolving disputes and allowing the courts to keep up with ever more unmanageable dockets."); *see also* Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 45 (1998) (discussing how mediation can be used to reduce the workload of courts); Harry T. Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21

Finally, the parties in an election dispute usually have to work together again in the future. This is especially true in state and local election disputes.[58] Because the professional relationship between the parties to election disputes does not usually end with the resolution of the dispute, mediation provides a positive alternative to the adversarial nature of litigation.[59]

2. *What Election Disputes Should Be Mediated?*

The process of getting parties to agree to mediate may be difficult, especially since an election mediation will most likely not consist of just two individual parties, but instead, multiple levels of potentially manifold political parties, each with varying strategies, agendas, and financial resources.[60] Further, mediation is a departure from the reliance on litigation in election disputes: litigation has been part of election strategy well before the 2000 election.[61] Political parties seem to like the publicity that comes with litigation—notifying voters that they are fighting policies and legislation that they perceive to favor another party.[62] In pre-election disputes, parties may be hesitant to file suit, let alone settle, relying instead on litigation as a strategy if they lose the election.[63] For example, a party may anticipate several problems with the election guidelines or processes before the election, but instead of resolving the issue before the election, the party may choose to wait and see first if they win the election.[64] If a party does not win,

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WILLAMETTE L. REV. 425, 433–37, 443–44 (1985) (discussing the potential relief on the courts provided by ADR).

[58] *See* STULBERG, *supra* note 53 (describing that parties can discuss their disagreements and create a less adversarial role in mediation than in litigation). For example, leading up to the 2008 general election, the Ohio Secretary of State's Office and the Attorney General by necessity were involved in nearly every election case either as a party or as legal representation. *See infra* Appendices III, IV, and V (Ohio cases).

[59] *Id.*

[60] Prof. Nancy Rogers, former Dean of The Moritz College of Law and interim Ohio Attorney General during the 2008 presidential election, noted in conversation with the author that one of the difficulties with mediating election disputes is the number of individuals, agencies, and different levels of a political party with interests in the disputed issue. Interview with Nancy Rogers, Interim Ohio Attorney General, Professor, Moritz College of Law, in Columbus, Ohio (Feb. 6, 2009).

[61] *See* Smith & Shortell, *supra* note 12, at 252–53 (discussing the increased use of election litigation as election strategy, especially in close presidential races).

[62] *Id.*

[63] *Id.*

[64] *Id.*

then the party can challenge the result of the election based on the issues with the election guidelines or processes. Had the party challenged these issues prior to the election, the party would risk the issues being resolved, still losing the election, and not having any ammunition or legal grounds with which to challenge a close election.

In order to get parties in an election dispute to the table, the mediation process will need to be mandatory.[65] Of course, in order for mediation in an election dispute to be mandatory, legislatures would have to enact statutes mandating mediation. Currently, no statutes exist that mandate mediation in any jurisdiction.[66]

Many pre-election disputes revolve around ballot access, voter access, machine use, disputed absentee and provisional ballot guidelines, voter identification, HAVA compliance disputes, campaign financing and advertising disputes, and ballot counting disputes.[67] Although there will always be unexpected issues or directives, parties can foresee many issues, some of which could be addressed in advance of an election. Even mandatory mediation, however, would not be the most appropriate form of resolution of

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[65] *See* Interview with Nancy Rogers, *supra* note 60 (discussing the difficulty with bringing parties in an election dispute to mediation voluntarily, in part, because of the number of participants, the use of litigation after the election as a campaign strategy, and the financial ability of parties to pursue litigation).

[66] *See* FEDERAL ELECTION COMMISSION, *supra* note 47 (detailing the Federal Elections Commission's use of alternative dispute resolution in certain election disputes); *see also infra* Appendix VI.

[67] *See, e.g.*, Consolidated Minor Party Cases, 2:08-cv-00224, 2:08-cv-00555, 2:08-cv-00819 (S.D. Ohio Mar. 7, 2008) (copy on file with author) (describing the Socialist, Libertarian, and Green Parties suing the Ohio Secretary of State for ballot access for the 2008 general election); Baker v. Chapman, No. CV-2008-900749.00 (Ala. Cir. Ct. July 21, 2008) (copy on file with author), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Baker-Order-10-9-08.pdf (challenging Alabama law prohibiting convicted felons, who are otherwise eligible to vote, from voting); Ray v. Franklin County Bd. of Elections, No. 2:08-cv-01086, 2008 WL 4966759 (S.D. Ohio Nov. 17, 2008) (alleging inadequate accommodations for disabled voters); Moyer v. Cortes, 497 MD 2008 (Pa. Commw. Ct. Oct. 17, 2008) (copy on file with author), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/moyerv.cortes.php (considering whether Pennsylvania can require first time registrants to show ID before voting); Premiere Election Sys. v. Cuyahoga County, 08 CV 007841 (Ohio Ct. Com. Pl. May 6, 2008) (copy on file with author), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/premierv.cuyahogacounty.php (voting machines); Ohio Republican Party v. Brunner, 544 F.3d 711 (6th Cir. 2008), (addressing whether Ohio Secretary of State had violated HAVA requirements); Wisconsin Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410 (2006) (campaign finance); Franken for Senate v. Ramsey County, 62-CV-08-11578 (Minn. Dist. Ct. Nov. 11, 2008) (copy on file with author) (recount of absentee ballots for disputed 2008 Minnesota Senate race).

post-election disputes. Parties are unlikely to be able to resolve post-election disputes in mediation in light of the high stakes finger-pointing and the need to certify the election results in a timely manner. As section III.B of this note argues, arbitration is a more appropriate approach to settling disputes close to the election, on election eve, election day, and following the election.

3. *What Would Mediation Look Like in These Election Disputes?*

Under current law, parties have an incentive to wait until after elections to challenge results.[68] In order to provide a uniform process across jurisdictions, a federal statute would provide the best vehicle for a mandatory mediation provision for pre-election disputes. To be effective, a monetary incentive encouraging states to adopt and implement the statute would be necessary.[69]

The most appropriate form of mediation for election disputes would most likely involve a court-appointed mediator, meaning that he or she mediates disputes for the court on a regular basis or as his or her sole occupation.[70] This neutrality is designed to eliminate any questions of bias.[71] Additionally, the mediation record should not be confidential, but public record, to promote transparency.[72]

Beyond these confines, mediation, even in election disputes, can largely be an instrument of the parties. In the event that the dispute does not settle, litigation still exists as an alternative means of resolving the dispute. However, in the event that litigation becomes necessary, the attempted resolution of the dispute without judicial intervention is still valuable.[73] By mandating mediation early, parties will have more autonomy in settling their disputes without some of the time restraints associated with those disputes filed closer to elections.

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[68] *See* Smith & Shortell, *supra* note 12, at 252.

[69] *E.g.*, New York v. United States, 505 U.S. 144, 188 (1992) (noting that under the Tenth Amendment of the Constitution, Congress cannot compel state legislatures to adopt federal law or regulations, but may attach related grants that entice state and local government to adopt the federal legislation).

[70] *See* Interview with Nancy Rogers, *supra* note 60 (noting that court-employed mediators may be perceived as more neutral because their occupation is to mediate).

[71] *Id.*

[72] *See* Harry T. Edwards, Comment, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); *see also* Tokaji, *supra* note 10, at 1247 (noting that the lack of transparency in an election process can be detrimental to the public confidence).

[73] *See* Riskin & Welsh, *supra* note 54, at 872.

4. *Possible Criticisms of the Use of Mediation in Election Disputes*

Critics of mediation raise questions regarding the benefits of mediating pre-election disputes. They cite the lack of empirical studies that support the benefits raised by proponents of mediation.[74] Further, critics note that individuals may attain a less advantageous settlement in mediation than in litigation because parties may lack an understanding of their legal situation. For example, an individual may elect not to have legal counsel present in the mediation.[75] Critics also argue that any supposed benefit of lightening the justice system's caseload is also unsupported by studies.[76] Further, critics note that mediation hampers the evolution of judicial precedent if cases settle outside of the courtroom.[77]

When applying mediation to election law, critics also argue that the use of mediation in most pre-election litigation is untenable. First, the use of mediation in pre-election litigation may result in the loss of potentially important precedent.[78] As new election issues continually emerge, election officials, parties, and courts have to address each issue anew if the issue is of first impression in the jurisdiction. Because mediation occurs outside of the courts, critics may argue that important decisions on issues resolved in mediation could potentially encourage related issues to repeatedly arise because the courts in the jurisdiction will not have publicly addressed the issue.[79]

In actuality, however, any potentially lost precedent in election law is likely to have little or no negative effect on future election disputes because

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[74] *E.g.*, Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 392–93 (1986) (discussing the lack of research on mediation to support any actual effect on the lightening of the courts' dockets).

[75] *See* Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145, 153–54 (1988) (raising concerns that the "unstructured" and "unchecked" interactions in alternative dispute resolution will allow prejudices and inequality to prevail). *But see* JAY FOLBERG & ALISON TAYLOR, MEDIATION 246–47 (1984) (arguing that inequality occurs in litigation, as in alternative dispute resolution).

[76] *See* Posner, *supra* note 74, at 392–93.

[77] *E.g.*, Owen Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (expressing concern at the potential loss of precedent from cases settled in mediation).

[78] *Id.*

[79] *Id.*

of the nature of pre-election disputes.[80] Specifically, election issues that tend to arise before an election so are often highly dependent upon the facts, jurisdiction, and specific election, that the decisions in these cases would be unlikely to provide any guidance in other election cases.[81] Any precedent would be of little value in the ever-evolving and nuanced issues in election disputes.[82]

Further, a critic may argue that removing disputes from litigation may result in voters having less of an idea of what is going on with elections, ultimately fostering ignorance of the election policies.[83] Perhaps the strongest criticism of using mediation in pre-election litigation is that political parties rely on the publicity and political strategy of litigation.[84] Settling disputes in mediation may reduce voters' understanding of the election process and important election disputes, and may lead them to perceive that a political party is weak for failing to fight unfavorable election policies.

However, disputes settled in mediation do not have to exclude the public. One option is to include in the statute that the mediation will not be subject to mediation confidentiality or privilege.[85] Consequently, political parties

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[80] Many election disputes revolve around very fact-specific details that are unlikely to play out again, due to several factors, including: jurisdiction, time-framing, parties involved, directives, and unique election problems. For example, the cases arising out of the November 4, 2008 senate race centered around the counting of specific absentee ballots under Minnesota law and involved two closely matched candidates.

[81] *See, e.g.*, Bush v. Gore, 531 U.S. 98, 98–101 (2008) (detailing the dispute that arose after the 2000 general election in which the factors included: Florida state law, butterfly ballots, and a margin of 1,784 votes). *Compare* Sheehan v. Franken, 767 N.W. 2d 453, 456–57 (Minn. 2009) (detailing the dispute that arose after the November 4, 2008 general election in which the factors included: Minnesota state law, provisional ballots, and a margin of 207 votes). *See also infra* Appendices III, IV, and V (indicating that the disputes arising tend to vary greatly).

[82] *See, e.g.*, Ohio Secretary of State Directive, 2008-109, *available at* http://www.sos.state.oh.us/SOS/Upload/elections/directives/2008/Dir2008-109.pdf (notifying voters of absentee ballot ID errors. This was one of 122 election-related directives issued by the Ohio Secretary of State in 2008).

[83] *See* Edwards, *supra* note 72, at 678–79 (discussing the possible negative result of public ignorance about important legal issues when parties engage in mediation in lieu of litigation).

[84] *See* Smith & Shortell, *supra* note 12, at 252–53.

[85] Depending on the jurisdiction, mediation confidentiality may have more or less protection. In jurisdictions that have adopted the Uniform Mediation Act, all mediation communications are confidential, and mediation privileges prevent a court from requiring a mediator to testify concerning the mediation. Other jurisdictions have their own statutory guidelines for mediation confidentiality or evidence code, but courts may

wishing to litigate in order to focus negative attention upon another party or to underscore to the public that they are involved in the election process can still meet these goals through mediation. Because the statute could provide that mediation of election-related disputes will not be a confidential process, political parties in a pre-election dispute can discuss the mediation details with the public and media. This ensures that political parties still address the issues and also maintains the same publicity they would obtain through litigation.

5. *Summary*

Through mediation, parties would have an opportunity to control the outcome of the settlement. If the process of mediation is public record, no loss of public education regarding the election law will result from parties that settle in mediation. Mediation would also remove from the judicial system any decisionmaking that could affect the outcome of an election. In sum, providing mandatory mediation for parties in pre-election disputes would simultaneously maintain many of the positive aspects of litigation, while reducing some of the negative ones.

B. *Mandatory Arbitration in Election Disputes for the Month Prior to the Election, Election Eve and Election Day, and Post-Election*

While mediation is appropriate for some election disputes, those disputes that arise close to, or on the election day require a stronger role by a third party. If parties do not reach an agreement in mediation, they may elect to litigate the dispute. Before an election, parties may have more time to mediate, as opposed to when the election nears and decisions must be made. Mandatory arbitration, unlike mediation, requires that a third party neutral make a definitive judgment in the dispute that then binds the parties.[86]

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ultimately weigh the need for confidentiality against public policy. *See, e.g.*, Rojas v. Superior Court, 93 P.3d 260, 271 (Cal. 2004) (holding that the California legislature intended to protect mediation confidentiality). *But see* Bank of Am. Nat'l Trust & Sav. Assoc. v. Hotel Rittenhouse Ass'n, 800 F.2d 339, 346 (3d Cir. 1986) (holding that public access to information outweighed the need for confidentiality in mediation). Additionally, confidentiality is thought to further use of mediation because it gives parties the confidence to approach mediation honestly with the goal of settling without the concern that any information will be aired in public. *See, e.g.*, Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1181 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082, 1082 (9th Cir. 2000) (holding that mediation confidentiality was necessary to support the legislature's promotion of mediation).

[86] *See* GOLDBERG ET AL., *supra* note 48, at 213–14.

Instead of facilitating the parties to resolve their dispute, the tensions and time sensitivity of disputes within the month prior to the election, on election eve or election day, and afterward, require that third party involvement play a more direct and decisive role.[87] Due to the urgency of resolving the dispute, it is important for a third party to decide the outcome of the dispute instead of allowing the parties to reach their own agreement, as in mediation.

1. *What Is Arbitration and Why Use It Instead of Litigation in Election Disputes?*

Arbitration is a form of alternative dispute resolution in which a decision, made by an arbitrator (a neutral third party), becomes a court-ordered, binding decision on a dispute.[88] Arbitration, like mediation, has many theoretical advantages over litigation, including: finality, procedural informality, cost savings, and expediency.[89] Ordinarily, arbitration under the Federal Arbitration Act (FAA)[90] allows parties to agree to features of arbitration through contract, specifically: the manner of selecting the arbitrator, the issues to be arbitrated, the procedural processes, and the substantive law to be applied.[91]

However, one of the disadvantages of arbitration is that many of these theoretical advantages do not always carry over into reality.[92] For example, parties may focus on finding an arbitrator that is more to the party's advantage, rather than finding one that has expertise in the area of the dispute.[93] Because of the choice of substantive law, parties may also try to bring in court procedures to such an extent that the arbitration process so resembles litigation that the purpose of arbitrating the dispute, as opposed to litigating it, is essentially defeated. In addition, the arbitrator, not the parties,

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[87] *See, e.g.*, Smith & Shortell, *supra* note 12, at 252; *see also infra* Appendices IV and V (detailing the cases filed on or after October 4, 2008, one month before the general election, all of which sought a third party (the court) to intervene).

[88] *See, e.g.*, Smith & Shortell, *supra* note 12, at 252.

[89] *See id.*

[90] The Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2002) [hereinafter FAA]. The FAA provides guidelines for arbitration. *See infra* Appendix VII for the pertinent parts of the act.

[91] *See* Hall Street Assoc. v. Mattel, Inc., 128 S. Ct. 1396, 1404 (2008).

[92] *See e.g.*, Delgado, *supra* note 75, at 153–54 (raising concerns that the "unstructured" and "unchecked" interactions in alternative dispute resolution will allow prejudices and inequality to prevail).

[93] *See* GOLDBERG ET AL., *supra* note 48, at 214.

controls the outcome of the dispute,[94] and the arbitration award is officially binding when a court approves it.[95]

2. *What Election Disputes Should Be Subject to Arbitration?*

Election disputes that arise within the month before the election, on election eve or election day, and post election should be resolved through mandatory arbitration. Many of the disputes that arise during this period are extremely time-sensitive and require a court order of some manner—usually an injunction.[96]

Arbitration would allow the parties to seek an injunction or other remedy before an arbitrator and have the court either approve or deny the arbitrator's ruling.[97] This would relieve some of the pressure on courts to hear all of the disputes, instead allowing the arbitrator to resolve the cases. For cases that affect the way in which the election itself is run, finality is essential to give poll workers and voters a clear solution on how to conduct the election and ensure that votes count.[98] Likewise, for cases involving disputed election results, finality is important because of hard deadlines for results and ensures that constituents have a representative or leader.[99]

Finally, mandatory arbitration of all disputes occurring one month before the election and beyond serves as an incentive for parties to raise issues early and to settle them in mediation. Once the dispute enters arbitration, the party no longer has the advantage of having control over the outcome of the dispute.[100] This lack of control may help shift some of the election dispute cases that are foreseeable to before the election.

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[94] *See id.*

[95] *Id.*

[96] *See* Interview with Nancy Rogers, *supra* note 60 (discussing that many parties seek to obtain a court-ordered injunction leading up to. or after, the election).

[97] *See* FAA, 9 U.S.C. § 10 (2002) (discussing the requirement of judicial certification of arbitration awards and the review process); *see also infra* Appendix VII.

[98] *See* Tokaji, *supra* note 10, at 1244 (noting that if the directive or guidelines change on election eve or election day, poll workers and voters may not be certain about what the actual directive or guidelines are or how to implement them, potentially leading to confusion at the polls).

[99] *See, e.g.*, Sheehan v. Franken, 767 N.W.2d 453, 456 (Minn. 2009).

[100] *See* Tyler, *supra* note 55, at 436 (noting that parties in mediation have control over the outcome of the settlement). If a party could address an issue earlier than one month prior to an election, but chose to wait, the party no longer has control over the outcome and is bound by the decision of the arbitrator, which may not be in the party's favor.

3. *What Would Arbitration Look Like in These Election Disputes?*

Because arbitration takes the control out of the hands of the parties, the guidelines need to be clear. While most parties subject to arbitration have the choice to make the process private, parties should not have that option for settling election disputes; instead the process should be one of public record, similar to litigation, to promote transparency.[101] Further, the procedural processes for the arbitration need to be statutorily defined and not for the parties to decide.[102] Because the FAA allows parties great leeway in selecting the procedural processes for arbitration,[103] a new statutory provision will need to specifically detail the procedural processes for these time-sensitive election disputes.

In the arbitration of election disputes, the decisionmaker should not be one neutral third party, but should consist of a three-person panel. The three-person panel should consist of one arbitrator selected by each party and a third neutral arbitrator who is selected by the initial two arbitrators.[104] In the event that either, or both sides, to the dispute consist of multiple parties, as they often do,[105] the parties on each side of the dispute must agree on one arbitrator for that side to narrow down to a three-member panel.[106] Allowing the parties to select one of the arbitrators themselves should alleviate concerns of biases.[107]

A statute for this mandatory arbitration process must also clearly define a strict period for the process as a whole, due to the time-sensitive nature of elections. The example in Section IV of this note provides for a systematic time frame to avoid confusion and to ensure expediency. However, some

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[101] *See* Edwards, *supra* note 72, at 678–79 (discussing the possible negative result of public ignorance about important legal issues when parties engage in mediation in lieu of litigation).

[102] *See* GOLDBERG ET AL., *supra* note 48, at 213–14 (noting that the more that the parties decide on their own, the greater the chances for time to lapse).

[103] *Id.*

[104] *See* Posting of Edward Foley, *supra* note 32 (proposing that, in order to avoid perceived biases of judges in their decisions, election disputes should be settled by a three-person tribunal that both hears the dispute and issues a decision; the tribunal would consist of one member selected by each party (a Republican and a Democrat) and then those two members would select a third neutral member).

[105] *See* Interview with Nancy Rogers, *supra* note 60.

[106] *See* Tokaji, *supra* note 10, at 1244.

[107] *Id.*

disputes will require emergency injunctions, and the court will maintain the discretion to order the injunction pending the results of arbitration.[108]

In order for these election arbitration awards to be binding on the parties, the court must certify the awards.[109] Further, courts should have a high level of deference for the arbitration awards in these election disputes in order to ensure both expediency and to help keep judges separate from political decision-making.[110]

4. *Possible Criticisms of the Use of Mandatory Arbitration in Election Disputes*

Under the current system, post-election litigation is often used as an election strategy by political parties, thus, altering the current system will likely draw criticism.[111] Because the application of mandatory arbitration would be a new concept in the field of election disputes and may alter the campaign strategy of waiting to sue until after the election, criticism of its use is likely to follow.

One criticism may be that the delay caused by the parties in selecting their arbitrators and the neutral arbitrator may negate the timesaving benefits of arbitration.[112] This is a common and formidable criticism of arbitration in general.[113] In order to make arbitration work in a time-efficient manner, parties would have to prepare ahead of time. For instance, if each political party, agency, or government agency had a pool of qualified arbitrators from which it could select during election season if a dispute were to arise, this may greatly reduce any delay caused by selecting arbitrators for the panel. Of course, not all election disputes are foreseeable, and individual parties may not have any reason to anticipate the need for an arbitrator in advance of a dispute.

There may also be issues of organizing arbitrations expediently for time-sensitive injunctions. Most election disputes enter into the court system as a

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[108] *See, e.g.*, Ohio Republican Party v. Brunner, 544 F.3d 71 (6th Cir. 2008) (en banc).

[109] *See* GOLDBERG ET AL., *supra* note 48, at 213–14.

[110] *See generally* Ohio Republican Party, 544 F.3d at 70.

[111] *See* Smith & Shortell, *supra* note 12, at 252–53.

[112] *See* GOLDBERG ET AL., *supra*, note 48, at 213–14.

[113] *Id.*

request by one party for injunctive relief.[114] Because of the difficulties in forming an arbitration panel at a moment's notice, relying on arbitration to seek an injunction may be unrealistic under time-sensitive circumstances. In emergencies, courts will still maintain the discretion to issue injunctions pending arbitration.[115]

A final criticism of the use of arbitration in election disputes is that the courts will still need to be involved, and judges may still seem politically motivated in having to certify arbitration awards.[116] While courts look at arbitration awards to determine whether or not to certify them, courts are held to a standard of review that gives great deference to the arbitrator, or in this case, the arbitrating panel.[117] The courts will still be involved in the mandatory arbitration process, but the process will provide a level of separation between judges and direct decisionmaking.[118]

5. *Summary*

The use of mandatory mediation and arbitration in election disputes will preserve many of the benefits of pre-election litigation, avoid the negative toll on courts and election fairness, and avoid post-election disputes that leave the outcome in ongoing limbo. Mandatory arbitration may reduce the use of post-election litigation as an election strategy by encouraging parties to mediate those issues that arise within the one month period before an election.

IV. THE NEED FOR A FEDERAL STATUTE MANDATING PRE-ELECTION MEDIATION AND POST-ELECTION ARBITRATION

Realistically, in order to move parties to mediate or arbitrate during the election process, when the stakes can be high, the process must be mandatory.[119] In order for the process to be mandatory, a legislature must enact a statute mandating this process. Further, to ensure uniformity across

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[114] *See* Interview with Nancy Rogers, *supra* note 60 (discussing that many parties seek to obtain a court-ordered injunction leading up to or after the election); *see also infra* Appendices III, IV, and V.

[115] *See* Tokaji, *supra* note 10, at 1244 (arguing that court injunction should be swift or "not at all").

[116] *See* FAA, 9 U.S.C. § 10 (2002).

[117] *See id.* (discussing the great deference that judges give to arbitrators).

[118] *See* Fiss, *supra* note 77, at 1085.

[119] *See* Interview with Nancy Rogers, *supra* note 60.

jurisdictions and to actually motivate jurisdictions to participate, the statute should be a federal statute that provides monetary incentives for state adoption.[120]

Congress could amend HAVA or create a separate statute. However, the adoption of a statute mandating mediation and arbitration in election disputes must provide grant money to the states as a means of encouraging the states to adopt it.[121] Further, it is important for this money to further the states' abilities to run efficient and effective elections.[122] While there are many facets of the election law process that are in need of additional funding, one of the most deserving areas is that of election accuracy—for example, poll-worker training, voter education, and accurate methods of counting ballots.[123] If a state adopts the statute, the federal government would give grant money to the state to help the state improve its elections.[124]

The statute itself should clearly set out the period during which mediation or arbitration is mandatory and the time frame of the process.[125] The statute should be designed so that once a party files a complaint or a request for an injunction, that filing triggers the appropriate process—either mediation or arbitration.[126] In the event of an emergency filing, the statute should still provide for a court to issue an injunction pending mediation or arbitration, depending on the time of filing. Further, the statute should clearly set out the process that the parties should follow to complete mediation or arbitration. Finally, the statute should consider the fee distribution between the parties.

The following is an example of a proposed draft of the federal statute:

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[120] *See* New York v. United States, 505 U.S. 144, 188 (1992).

[121] *Id.*; *see also* HAVA §§ 15522, 15523 *infra* Appendix I.

[122] *See New York*, 505 U.S. at 188.

[123] Posting of Thad Hall & Daniel Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, Election Updates Blog, http://electionupdates.caltech.edu/ (June 5th, 2007 1:32 pm CT) (discussing the need for more funding to effectively run elections).

[124] HAVA has provided a similar provision. *See infra* Appendix I for §§ 15522, 15523.

[125] In the sample statute below, the time frame for the mediation process is set to expediently handle disputes. After the pleading is filed, the process requires that the parties mediate within seven days of the filing. For arbitration, the sample statute below also reflects the need for expediency regarding the election time frame.

[126] *See, e.g.*, Riskin, *supra* note 51, at 34 (discussing how the litigation process can take a much longer time than the mediation process).

"The Act to Promote More Efficient, Transparent, and Accurate Democratic Elections"

(I) Mediation: Adoption of this law by a state will mandate mediation for all election disputes filed in a court between or on January 1 of the year of the election and prior to one month to the date of the election. [For example, for an election on November 4th of Year X, all disputes filed on January 1 of Year X through October 3rd of Year X will be subject to mandatory mediation. All disputes filed on October 4th of Year X and onward, even beyond Year X, will not be subject to mandatory mediation.]

(A) Terms

(1) "Mediation" in this statute means the meeting of the parties involved in the dispute with a court-appointed, third party mediator who works with the parties to facilitate settling the dispute.

(2) "Election dispute" in this statute means any election-related disagreement between parties for which parties have sought legal intervention.

(B) When a party files a pleading with a court seeking relief against another party in an election dispute within the time frame detailed in (1), the court will automatically send the dispute to mandatory mediation before a court-appointed mediator.

(1) The court must send the dispute to a court-appointed mediator within twenty-four (24) hours of the election-related filing; and

(2) The court-appointed mediator must inform the parties of the mediation, mediation date, time, and location within forty-eight (48) hours of the filing, or twenty-four (24) hours of court-appointment, whichever is earlier; and

(3) The parties to mediation must meet within seven (7) days of the filing, or two (2) days if the court deems it an emergency; and

(4) Failure to attend mediation will be noted for the court.

(C) The parties may choose to keep the mediation process confidential,

or, in the interest of transparency, may choose to open the mediation process to public record.

(D) Any agreement reached by the parties will be filed with the court.

(E) Failure of the parties to reach an agreement will return the parties to litigation.

(F) Mediator fees will be split between the parties evenly.

(II) Arbitration: Adoption of this law by a state will mandate arbitration for all election disputes filed in a court on the date one month prior to an election through any post-election disputes. [For example, for an election on November 4th of Year X, all election disputes filed on October 4th of Year X through the election and even beyond Year X, but still regarding the November 4th election, will be subject to mandatory arbitration.]

(A) Terms:

(1) "Arbitration" in this statute means the meeting of two or more parties with an arbitrating panel and that panel will issue a decision that will then go before the court for certification.

(2) "Arbitrating panel" in this statute means a three (3) person panel of arbitrators. Each party to the dispute will select one (1) arbitrator of their choice. If there are multiple parties on each side of a dispute, only the named parties may participate in the selection of the arbitrator, so each side must agree to a shared arbitrator. Each side to a dispute may select only one (1) arbitrator for a total of two (2) arbitrators, one (1) selected by each side to a dispute. The two (2) selected arbitrators will then pick a third neutral arbitrator of their choice.

(3) "Arbitration decision" in this statute means the decision issued by the arbitration panel. A decision requires a minimum of two (2) arbitrators to sign off on the decision, unless none of the panel members can agree to one decision. In the event that two (2) arbitrators cannot agree to a decision, the third neutral arbitrator selected by two (2) party-appointed arbitrators will issue the final decision for the panel, and in this case, a decision requires only one (1) arbitrator, the third neutral arbitrator, to sign it.

(4) "Election dispute" in this portion of the statute shares the same meaning as in §1 of this Act and throughout the statute.

(B) When a party files a pleading with a court seeking relief against another party in an election dispute within the time frame detailed in (2), the court will automatically send the dispute to mandatory arbitration.

(1) The court must send the dispute to arbitration and notify the parties to select their arbitrator within twenty-four (24) hours of the election-related filing; and

(2) The parties will have twenty-four (24) hours from the date of notification to select their arbitrator. Those arbitrators will then have an additional twenty-four (24) hours to select the third neutral arbitrator.

(3) The parties must meet in a state-provided conference room to begin arbitration within forty-eight (48) hours of the selection of the third arbitrator.

(4) In the event of an emergency injunction, at the discretion of the court, the court may issue an injunction pending arbitration.

(C) The mandatory arbitration process will not be confidential and any records from the process will be open to the public in order to promote transparency of the election process.

(D) The procedural process of each arbitration will be selected by each arbitrating panel with consideration of the timeliness of the issue. The arbitrators must select either an arbitration process in which the rules of discovery and the rules of evidence do not apply, or an arbitration process in which the rules of discovery and the rules of evidence do apply.

(E) Arbitration will be held in a large conference room provided by the state. The state shall set aside, in advance of the election, conference rooms for the use of arbitration.

(F) Arbitrator fees will be paid by the party against whom judgment is

not in favor.

(G) Awards and remedies will be the same as those available in litigation.

(H) Judicial certification of the arbitration award should follow the statutory guidelines of the Federal Arbitration Act, 9 U.S.C. §10 (2000), but must fall within the time frame of thirty (30) days after the award has been given to the court.

(I) Adoption of this statute also provides the state with $5 million to be paid to the state in installments, but paid in full within five (5) years of adoption to train and recruit poll workers in the state to further the efficiency and accuracy in the promotion of the democratic election process.

V. CONCLUSION

In sum, election litigation has become a large part of the election process and strategy since the 2000 presidential election. The congestion and timing of election litigation can frustrate courts, election officials, candidates, and voters. By utilizing mandatory mediation and arbitration as alternatives to litigation, jurisdictions can reduce the burden on their courts, reduce the risk of compromising the integrity of judges, promote the transparency of elections, increase voter efficacy and faith in the election system, and save taxpayers money.

Appendix I: The Help America Vote Act of 2002 (HAVA)

42 U.S.C. § 15481(a)(2)(B) (2006): Voting system standards

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.
(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.
(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

42 U.S.C. § 15482(a) (2006): Provisional voting and voting information requirements

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is—

(A) a registered voter in the jurisdiction in which the individual desires to vote; and
(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)

(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional Ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

42 U.S.C. § 15483(a)(1)(A) (2006): Computerized statewide voter registration list requirements

[E]ach State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each

legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

42 U.S.C. § 15512 (2006): Establishment of State-based administrative complaint procedures to remedy grievances

(a) Establishment of State-based administrative complaint procedures to remedy grievances. . . .

(2) Requirements for procedures

The requirements of this paragraph are as follows: . . .

(H) The State shall make a final determination with respect to a complaint prior to the expiration of the 90-day period which begins on the date the complaint is filed, unless the complainant consents to a longer period for making such a determination.

(I) If the State fails to meet the deadline applicable under subparagraph (H), the complaint shall be resolved within 60 days under alternative dispute resolution procedures established for purposes of this section. The record and other

materials from any proceedings conducted under the complaint procedures established under this section shall be made available for use under the alternative dispute resolution procedures.

42 U.S.C. § 15522 (2006): Activities under Program

(a) In general. In carrying out the Program, the Commission (in consultation with the chief election official of each State) shall develop materials, sponsor seminars and workshops, engage in advertising targeted at students, make grants, and take such other actions as it considers appropriate to meet the purposes described in section 15521(b)of this title.

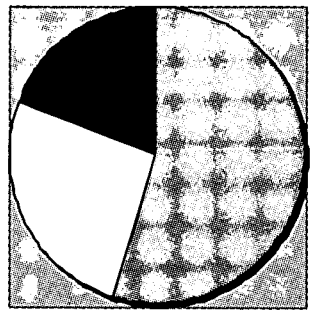
(b) Requirements for grant recipients. In making grants under the Program, the Commission shall ensure that the funds provided are Spent for projects and activities which are carried out without partisan bias or without promoting any particular point of view regarding any issue, and that each recipient is governed in a balanced manner which does not reflect any partisan bias.

(c) Coordination with institutions of higher education. The Commission shall encourage institutions of higher education (including community colleges) to participate in the Program, and shall make all necessary materials and other assistance (including materials and assistance to enable the institution to hold workshops and poll worker training sessions) available without charge to any institution which desires to participate in the Program.

42 U.S.C. § 15523 (2006): Authorization of appropriations

In addition to any funds authorized to be appropriated to the Commission under section 15330 of this title, there are authorized to be appropriated to carry out this subchapter—(1) $5,000,000 for fiscal year 2003; and (2) such sums as may be necessary for each succeeding fiscal year.

Appendix II: Graphical Representation of the Forty-Two Cases Filed Regarding the November 4, 2008 Presidential Election



Appendix III: Cases filed between January 1, 2008 and October 3, 2008[127]

State	Case(s)	Date Filed
Alabama	Baker v. Chapman, No. 03-CV-2008-900749.00 (Ala. Cir. Ct. filed July 21, 2008) (complaint banning felons from voting).	07/21/08
	Powell v. Alabama, No. 2:08-cv-01345 (N.D. Ala. filed July 29, 2008) (regarding accusation that Alabama law violates the Voting Rights Act of 1965).	07/29/08
Florida	League of Women Voters of Fl. v. Browning, 575 F. Supp. 2d 1298 (S.D. Fla. 2008) (filed Apr. 28, 2008) (challenging the constitutionality of new voter registration rules that allow third parties to process registration is unconstitutional).	04/28/08
Indiana	Curley v. Lake County Bd. of Elections and Registration, No. 2:08-cv-00287 (Ind. Ct. of App. filed Oct. 2, 2008) (decided Oct. 31, 2008)	10/02/08
	League of Women Voters Inc. v. Rokita, No. 49A02-0901-CV-00040, 2009 WL 2973120 (Ind. Ct. App. 2009) (filed June 20, 2008) (challenging the constitutionality of Indiana's voter ID law).	06/20/08
Michigan	Maletski v. Macomb County Republican Party, No. 2:08-cv-13982 (E.D. Mich. filed Sept. 16, 2008) (challenging alleged plans by Republicans to challenge voter registration of individuals whose homes appear on foreclosure listings).	09/16/08
Mississippi	Berger v. Barbour, No. 2008-M-01534-SCT (Miss. filed Sept. 10, 2008) (decided Sept. 18, 2008) (regarding clear distinction of special Senate race candidate from presidential race on the November 4, 2008 ballot).	09/10/08

[127] All cases are on file with the author.

New Hampshire	Hollander v. McCain, 566 F. Supp. 2d 63 (D. N.H. 2008) (filed Mar. 14, 2008) (challenging the citizenship of Senator McCain).	03/14/08
Ohio	Consolidated Minority Party Cases, No. 2:08-cv-00224, 2:08-cv-00555, 2:08-cv-00819 (S.D. Ohio filed Mar. 7, 2008) (concerning minority parties for president attempting to gain ballot access).	03/07/08
	Hamilton v. Ashland County Bd. of Elections, No. 88439, 2008 WL 4791442 (6th Cir. 2008) (filed in Dist. Ct. on Sept. 10, 2008; decided Nov. 03, 2008) (regarding whether otherwise eligible individuals incarcerated in juvenile detention centers may vote).	09/10/08
	Libertarian Party of Ohio v. Brunner, 567 F. Supp. 2d 1006 (S.D. Ohio 2008) (filed June 6, 2008) (challenging ballot access for the 2008 Presidential election).	06/06/08
	McKinney v. Brunner, No. 2:08-cv-00819 (S.D. Ohio filed Aug. 26, 2008) (challenging 2008 ballot access for the Libertarian Party).	08/26/08
	Moore v. Brunner, No. 2:08-cv-00224, 2008 WL 3887639 (S.D. Ohio 2008) (filed Mar. 7, 2008) (challenging ballot access for the Libertarian Party).	03/07/08
	Obama for America v. Cuyahoga Bd. of Elections, No. 08-CV-562 (N.D. Ohio filed Mar. 4, 2008) (regarding filing of injunction to extend polling hours in Cuyahoga County due to ballot shortages and bad weather on primary).	03/04/08

	Ohio Republican Party v. Brunner, Nos. 08-4242/4243/4251 (6th Cir. filed Sept. 26, 2008) (decided Sept. 30, 2008) (upholding the district court's TRO requiring the Secretary of state to meet HAVA voter registration matches and provide that information to the county boards of elections).	09/26/08
	Premier Election Sys. v. Cuyahoga County, No. 08 CVH05 007841 (Ohio Ct. of Com. Pl. filed May 30, 2008) (questioning whether Premier fulfilled its obligations to Cuyahoga County).	05/30/08
	State ex rel. Myles v. Brunner, 899 N.E.2d 120 (Ohio 2008) (filed Sept. 17, 2008; decided Oct. 2, 2008) (granting writ to compel the Secretary of State to issue an order to prevent county boards of elections from rejecting certain absentee ballots).	09/17/08
	State ex rel. Colvin v. Brunner, No. 08-1813, (Ohio filed Sept. 12, 2008) (decided Sept. 29, 2008) (denying a writ of mandamus to compel the Secretary of State to void certain absentee ballots).	09/12/08
	State of Ohio ex rel. Doucher v. Brunner, No. 08-1872 (Ohio filed Sept. 19, 2008) (dismissed Oct. 1, 2008) (regarding rejection of absentee ballots).	09/19/08
Pennsylvania	Berg v. Obama, 574 F. Supp. 2d 509 (E.D. Pa. 2008) (filed Aug. 21, 2008; decided Oct. 24, 2008) (challenging Obama's citizenship).	08/21/08
Rhode Island	Rhode Island ACLU v. R.I. Bd. of Elections, No. PC 08- (R.I. Super. Ct. filed Sept. 11, 2008) (regarding adoption of new voting law).	09/11/08

South Carolina	S.C. Green Party v. S.C. Elections Comm'n, No. 3:08-cv-02790, 2009 WL 2513450 (D.S.C. 2009) (filed Aug. 7, 2008; Aug. 12, 2009) (upholding the constitutionality of a statute banning a candidate from running for multiple parties in the same election race).	08/07/08
Wisconsin	Van Hollen v. Gov't Accountability Bd., No. 2008CV004085 (Wis. Cir. Ct. filed Sept. 10, 2008) (remitted in the Court of Appeals Jan. 23, 2009) (regarding whether Government Accountability Board has met its obligations to bring Wisconsin elections within compliance of both state and federal laws).	09/10/08

Appendix IV: Cases Filed Between October 4, 2008 and November 4, 2008[128]

These cases represent cases filed one-month before the election, cases filed on election eve, and cases filed on Election Day.

State	Case(s)	Date Filed
Florida	Green v. Doe, No. 37 2008-CA-003551 (Fl. Cir. Ct. filed Oct 28, 2008 (decided Nov. 3, 2008) (reinstating a lower court injunction).	10/28/08
Indiana	Schoettle v. Marion County Bd. of Elections, 899 N.E.2d 642 (Ind. 2008) (filed Oct 29, 2008; decided Nov. 3, 2008).	10/29/08
Montana	Mont. Democratic Party v. Eaton, 581 F. Supp.2d 1077 (D. Mont. 2008) (filed Oct. 6, 2008; denied Oct. 10, 2008) (regarding a petition for a temporary restraining order to prevent the Secretary of State from counting absentee ballots).	10/06/08
New Mexico	Garcia v. Fox-Young, No. D-202-CV-200811178 (Dist. Ct. N.M. filed Oct. 27, 2008). League of Women Voters of N.M. v. Herrera, 203 P.3d 94 (N.M. 2009) (filed Oct. 23, 2008; granted Feb. 9, 2009) (petition for writ to compel Secretary of State to count hand-written ballots).	10/27/08 10/23/08
New York	In the Matter of Philip Ragusa, 57 A.D.3d 807 (N.Y. App. Div. 2008) (filed Nov. 4, 2008; decided Dec. 22, 2008) (regarding election workers refusing to cast ballots that were preliminarily determined to be invalid).	11/04/08

[128] All cases are on file with the author.

Ohio	Constitution Party of Ohio v. Delaware County Bd. of Elections, No. 08CVH101462 (Ohio Ct. Com. Pl. filed Oct. 31, 2008) (writ denied Nov. 3, 2008) (regarding a suit seeking a writ to allow certain poll observers at the election). State ex rel. Mahal v. Brunner, No. 2:08-cv-00983 (Ohio filed Oct 17, 2008) (dismissed Oct. 21, 2008) (regarding HAVA mismatches). State ex rel. Stokes v. Brunner, 898 N.E.2d 23 (Ohio 2008) (filed Oct. 3, 2008; decided Oct. 16, 2008) (regarding observers in polling places).	10/31/08 10/17/08 10/03/08
Pennsylvania	Moyer v. Cortes, No. 497 MD 2008 (Pa. Comm. Ct. filed Oct 17, 2008) (discontinued Dec. 24, 2008) (regarding eligibility of certain voters).	10/17/08
Virginia	Virginia NAACP v. Kaine, No. 2:08-cv-00508 (E.D. Va. filed Oct. 28, 2008) (dismissed without prejudice Nov. 14, 2008).	10/28/08

Appendix V: Cases Filed on or After the November 5, 2008 Election.[129]

State	Case(s)	Date Filed
Ohio	Ray v. Franklin County Bd. of Elections, No. 2:08-cv-1086, 2009 WL 1542737 (S.D. Ohio 2009) (filed Nov. 15, 2008; decided in favor of plaintiff on June 2, 2009) (regarding accommodation of disabled voters with absentee ballot access).	11/15/08
	State ex rel. Skaggs v. Brunner, 588 F. Supp.2d 828 (S.D. Ohio 2008) (filed Nov. 13, 2008; summary judgment granted Nov. 20, 2008 in favor of the Secretary of State) (regarding provisional ballot disputes).	11/13/08
Minnesota	Franken for Senate v. Ramsey County, No. 62-CV-08-11578 (Minn. Dist. Ct. filed Nov. 13, 2008) (granted Nov. 19, 2008) (regarding a suit for a temporary restraining order to prevent the recount of absentee ballots for disputed Minn. Senate race).	11/13/08
	Coleman v. Ritchie, 762 N.W.2d 218 (Minn. 2009) (filed Dec. 13, 2008; decided March 6, 2009) (challenging the counting of absentee ballots in Senate race).	12/13/08
	Franken v. Olmsted County, No. 55-CV-08-11879 (Minn. Dist. Ct. filed Dec. 16, 2008) (order to defer to Minn. S. Ct. issued on Dec. 18, 2008) (regarding a suit to order the court to find the that the county incorrectly rejected absentee ballots).	12/16/08

[129] All cases are on file with the author.

	Coleman v. Minn. State Canvassing Bd., No. A08-2206 (Minn. filed Dec. 19, 2008) (order denied Dec. 24, 2008) (challenging ballot counting for Senate race and requesting a temporary restraining to stop the count of contested absentee ballots).	12/19/08
	Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009) (filed Jan. 06, 2009; decided June 30, 2009) (upholding the lower court's award of the senate seat to Franken).	01/06/09
	Peterson v. Ritchie, No. A09-0065 (Minn. filed Jan. 13 2009) (originally filed Jan. 13, 2009; consolidated on Jan. 16, 2009 with Sheehan v. Franken, 767 N.W.2d. 453 (Minn. 2009)) (challenging counting of absentee ballots in disputed Minn. Senate race).	01/13/09

Appendix VI. Statutes by Jurisdiction

Jurisdiction	Statute(s)
Alabama	ALA. CODE § 17-2-3 (2007) (Alabama's HAVA complaint resolution, providing that after a complaint is filed, "[i]f the 90-day deadline is not met, the complaint shall be resolved within 60 days under alternative dispute resolution." *Id.* at (8)).
Colorado	COLO. REV. STAT. § 1-1.5-105 (2003) Colorado's HAVA complaint resolution, providing that "[r]esolution of the complaint within sixty days under an alternative dispute resolution procedure that the secretary shall establish . . . if the secretary fails to satisfy the applicable deadline . . . conducted under the complaint procedures established for use under such alternative dispute resolution procedures" *Id.* at (2)(j).
Connecticut	CONN. GEN. STAT. § 9-7b (2004) Connecticut's election disputes generally, providing that if the "commission fails to meet the applicable deadline . . . the commission shall resolve the complaint within sixty days after the expiration of such ninety-day period under an alternative dispute resolution procedure" *Id.* at F(18).
Florida	FLA. STAT. §97.023 (2002) (Florida's procedure for voter registration complaints); FLA. STAT. § 97.028 (2003) (HAVA complaint resolution) (both provide for an informal dispute resolution).
Kentucky	KY. REV. STAT. ANN. § 121.140 (2004) (Kentucky's procedure for campaign finance disputes).
Michigan	MICH. COMP. LAWS § 168.31 (2008) Michigan's procedure for election law disputes, provides for "an election day dispute resolution team." *Id.* at (1)(m); MICH. COMP. LAWS § 169.215 (2002) (campaign finance and advertising disputes).
Minnesota	MINN. STAT. § 200.04 (2009) (Minnesota's HAVA complaint resolution provides for alternative dispute resolution if the complaint has not been addressed by the secretary of state in ninety days).
Missouri	MO. REV. STAT. § 28.035 (2003) (Missouri's HAVA complaint resolution provides for alternative dispute

	resolution if a complaint has not bee handled by the secretary of state in ninety-days).
New Hampshire	N.H. REV. STAT. ANN. § 666.14 (2003) (New Hampshire's election complaint procedure and HAVA complaint resolution provides that the state attorney general may provide alternative dispute resolution for HAVA complaints).
New Mexico	N.M. STAT. § 1-2-2.1 (2004) (New Mexico's ADR process for election complaints that are not addressed by the secretary of state within sixty days).
New York	N.Y. ELEC. LAW § 3-105, §6116.2, § 6216.3 (McKinney 2007) (New York provision for ADR for election disputes).
North Dakota	N.D. CENT. CODE § 16.1-01-16 (2003) (North Dakota's HAVA complaint resolution provides for alternative dispute resolution for complaints not addressed by the secretary of state within sixty days).
Pennsylvania	25 PA. CONS. STAT. ANN. § 3046.2 (2007) (Pennsylvania's HAVA complaint resolution).
Federal	2 U.S.C. § 437g (2002) (FEC campaign finance ADR resolution); 42 U.S.C. § 15512 (2002)(HAVA ADR complaint resolution). *See* Appendix I

Appendix VII: Federal Arbitration Act (FAA), 9 U.S.C. §§10-11 (2002)

§ 10. Same; Vacation; Grounds; Rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.